IN THE

# Supreme Court of the United States

OCTOBER TERM, 1977
No. 76-1193

UNITED STATES OF AMERICA,

Petitioner,

v.

ESTELLE JACOBS, A/K/A "MRS. KRAMER",

Respondent.

## BRIEF FOR RESPONDENT ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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## TABLE OF CONTENTS



## CITATIONS

Cases:

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BRIEF IN OPPOSITION ON
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The United States of America on writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

## OPINIONS BELOW

The opinion of the Court of Appeals on remand (Pet. App. A, pp. 1A-14A) is reported at 547 F. 2d 772. The first opinion of the Court of Appeals (Pet. App. B, pp. 15A-22A) is reported at 531 F. 2d 87. The opinion of the District Court (Pet. App. E, pp. 26A-32A) is not reported.

## JURISDICTION

The judgment of the Court of Appeals was entered on December 30, 1976. On January 21, 1977, Mr. Justice Marshall extended the time within which to file a petition for a writ of certiorari to and including February 28, 1977. The petition was filed on that date and was granted on May 31, 1977 (A. 85). The jurisdiction of this Court rests upon



28 U.S.C. 1254(1).

## QUESTION PRESENTED

Whether a Court of Appeals possesses and may exercise supervisory powers to insure fair and even-handed administration of criminal justice in the circuit, by suppressing a defendant's grand jury testimony on the ground that the Special Strike Force prosecutor did not follow uniform circuit practice to warn the witness that she was a targeted putative defendant, against whom the government had alleged indictable incriminating evidence. *

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*The Strike Force prosecutor sought and was granted express authority for appearing before the Grand Jury to present evidence in United States v. John Doe (Woods and Jacobs) prior to respondent's appearance before Grand Jury (A. 84).

## STATEMENT

During May 1973 Respondent made telephone calls as part of her duties as an employee of a debt collection agency. Without her knowledge, the recipient of one of these calls from Respondent tape-recorded their conversation, during which Respondent allegedly made threatening statements (A. 5, 16-17, 60). On September 13, 1973, Respondent had been questioned by the Federal Bureau of Investigation about these alleged threatening telephone calls (Pet. App. 16A-17A).

On June 10, 1974, Respondent appeared before a Grand Jury in the Eastern District of New York.

Respondent, at the Grand Jury, was not given the complete Miranda warnings. Respondent's Grand Jury testimony on June



10, 1974 was the predicate of the perjury count of the indictment (A. 23-24).

Prior to her grand jury appearance, Respondent was not told that she had a right to remain silent before the grand jury. She was not told that counsel would be provided for her if she were unable to bear the expense herself. Furthermore, she was not told that she was a putative (target) defendant against whom the government held significant incriminating evidence, particularly the tape-recording of the allegedly threatening telephone conversation. Respondent was unrepresented at the time of her grand jury testimony, stating that she did not feel that she was in need of counsel (A. 2-4).

During the course of her grand jury appearance, Respondent was questioned about the telephone conversation which had taken

place thirteen months earlier (A. 23-24). Respondent answered from memory questions propounded by the government attorney which were, unbeknownst to Respondent, allegedly based on a transcript of the recording of the conversation which was the subject of the grand jury inquiry. Respondent was indicted for perjury and transmitting in interstate commerce a communication containing a threat. [Violating 18 U.S.C. 1623, 875(c).]

Before trial, Respondent moved to suppress her grand jury testimony on the ground that the government's warning to her had been constitutionally inadequate. The District Court granted the motion to suppress Respondent's Grand Jury testimony, basing its decision on a due process analysis. The perjury charge was dismissed (Pet. App. E, pp. 26A-32A).



The Court of Appeals affirmed the decision of the District Court and held that Respondent's grand jury testimony was properly suppressed. The Court of Appeals did not, however, base its decision on fifth amendment self-incrimination and due process considerations. Instead, the Court of Appeals for the Second Circuit found that the government's act of questioning Respondent before the grand jury, without informing her that she was a putative (target) defendant, was not only outside the penumbra of fair play, but was also not in conformity with established uniform prosecutional practice in the circuit.*

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*Upon learning that the government attorney who had questioned respondent before the grand jury -- a "Strike Force" attorney -- had not told her that she was a "target" of the investigation, the court directed its clerk to poll the six United States Attorneys in the Second Circuit to learn their practice in this

Basing its decision on the need to secure uniform and even-handed application of criminal procedure within the circuit, the Court of Appeals exercised its supervisory power and affirmed the suppression of the grand jury testimony and, therefore, the dismissal of the perjury count of the indictment (Pet. App. B, pp. 19A-22A).

On November 1, 1976, the Court granted Respondent's petition for a writ of certiorari (No. 75-1883), vacated the judgment of the Court of Appeals, and remanded for reconsideration in light of United States v.

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regard. Each replied that he customarily warns grand jury witnesses who are "putative defendants" of their status. This survey indicated to the court that respondent would have been warned that she was a "putative defendant" if she had been subpoenaed by the United States Attorney, yet "the Strike Force operating in the same district failed to give her such warning" (Pet. App. 21A).



Mandujano, 425 U.S. 564, 96 S.Ct. 1768, 48 L. Ed. 2d 212 (1976).

On remand, the Court of Appeals adhered to its earlier decision, stating it had anticipated and agreed with this Court's ruling in Mandujano and that its own ruling had not been based on constitutional grounds, but on its supervisory power and duty to avoid uneven justice in the circuit, resulting from the government's mere negligence or inattention to established practice and guidelines (Pet. App. 3A-6A).

The Court of Appeals rejected the government's arguments that its exercise of supervisory powers by suppression of testimony was barred by 18 U.S.C. 3501(a), Rule 402 of the Federal Rules of Evidence and stated that the sanction of suppression was ad hoc, salutory and appropriate.

## THE COURT OF APPEALS HAD SUPERVISORY POWER TO SUPPRESS RESPONDENT'S GRAND JURY TESTIMONY AND IS NOT PRECLUDED BY 18 U.S.C. 3501(a) OR RULE 402 OF THE FEDERAL RULES OF EVIDENCE FROM EXERCISING SUCH INHERENT DISCRETION

1. In the decision under consideration here, the Court of Appeals decided to exercise its power to supervise the administration of criminal justice within the circuit to secure the goal of uniform and just criminal procedure. It cannot be denied that the federal courts possess such supervisory power. Cupp v. Naughten, 414 U.S. 141, 146, 94 S. Ct. 396, 400, 38 L. Ed. 2d 368 (1973); LaBuy v. Howes Leather Co., 352 U.S. 249, 259-60, 77 S. Ct. 309, 1 L. Ed. 2d 290 (1957); Burton v. United States, 483 F. 2d 1182 (9th Cir. 1973); United States v. Estepa, 471 F. 2d 1132, 432 (2nd Cir. 1972). The particular application of this power here, to



require that putative defendants be given fair warning of their actual status prior to appearing before a grand jury, conflicts with no law of Congress, decision of this Court or of any circuit court of appeals. What Petitioner seeks is, in effect, for this Court either to hold that the courts of appeal do not have power to supervise grand jury procedures or to substitute its own idea of desired procedure for that of the court below.

That the federal courts have power to supervise the administration of federal criminal justice is a fundamental tenet of long and uniform acceptance. This supervisory power may be exercised by suppression of otherwise relevant evidence for reasons not limited to application of only minimal constitutional guarantees. This principle has been accepted as basic since the decision of

this Court in McNabb v. United States, 318 U.S. 332, 63 S.Ct. 608, 87 L.Ed. 819 (1943). The reasoning which underlies the exercise by any federal court of its power to supervise criminal justice was stated in that case:

> Judicial supervision of the administration of criminal justice in the federal courts implies the duty of establishing and maintaining civilized standards of procedure and evidence. Such standards are not satisfied merely by observance of those minimal historic safeguards for securing trial by reason which are summarized as "due process of law" and below which we reach what is really trial by force . . . . Considerations of large policy in making the necessary accommodations in our federal system are wholly irrelevant to the formulation and application of proper standards for the enforcement of the federal criminal law in the federal courts.
>
> The principles governing the admissibility of evidence in federal criminal trials have not been restricted, therefore, to those derived solely from the Constitution. In the exercise of its supervisory authority over the administration of criminal



> prosecution. . . . And in formulating such rules of evidence for federal criminal trials the Court has been guided by considerations of justice not limited to the strict canons of evidentiary relevance. (Citations omitted.) 318 U.S. at 340-341.

Particularly applicable to the issue presented here is the statement in McNabb that:

> The function of formulating rules of evidence in areas not governed by statute has always been one of the chief concerns of courts: "The rules of evidence on which we practise today have mostly grown up at the hands of the judges; and, except as they may be really something more than rules of evidence, they may, in the main, properly enough be left to them to be modified and reshaped." J. B. Thayer, A Preliminary Treatise on Evidence at the Common Law (1898) pp. 530-31. 318 U.S. at 341, n. 1.

The courts of appeal certainly believe that they possess power to supervise the administration of criminal justice within their respective circuits. This fact is amply illus-

trated by the statement of the Ninth Circuit in Burton v. United States, 483 F.2d 1182 (9th Cir. 1973):

> Finally, we conceive it to be our duty, exercising our supervisory power, to assure that there be the strictest compliance with the requirement of Rule 11. That this court has such supervisory power is hardly deniable. In La Buy v. Howes Leather Co., 352 U.S. 249, 77 S.Ct. 309, 1 L.Ed.2d 290 (1957), the United States Supreme Court held that "... supervisory control of the District Courts by the Courts of Appeals is necessary to proper judicial administration in the federal system." Id. at 259-260, 77 S.Ct. at 315. Moreover, this pronouncement by the Nation's supreme judicial authority has been reaffirmed by every Court of Appeals, including our own, that has confronted the issue. 483 F.2d at 1187.

Especially significant is the extraordinary recitation of authorities presented by the Burton court in support of its view.

The Second Circuit stated herein:

We exercised supervisory power in



> the limited area of the relationship between the Strike Force attorney and the United States Attorney under a fair inference from the Guidelines, though not as a generally applicable exclusionary rule. Although we have confirmed the right of Strike Force attorney to appear before the grand jury ... we are not committed by statute to allowing them to come into the Circuit to evade the rules and supervision of the United States Attorneys. We think it our duty to avoid uneven justice in the circuit .... supra, 547 F.2d at 774-775.

Of course, the power of federal courts to supervise the administration of criminal justice may be circumscribed by Congress, if that body decides to assert its authority in respect to a particular matter of criminal procedure. Congress has not acted in the manner of the supervisory suppression of testimony extracted from a witness appearing before a grand jury without having been apprised that the focus of the investigation is directed at the witness himself.

Petitioner propounds two general Acts of Congress relating to the admissibility of evidence and asserts that certain phrases of those acts, taken out of context, operate to void the well-recognized power of federal courts to supervise grand jury practice in their circuits. In support of its argument, Petitioner extracts from 18 U.S.C. §3501(a) the phrase: "shall be admissible in evidence if it is voluntarily given." That section, part of the Omnibus Crime Control and Safe Streets Act of 1968, is not applicable to this case, and was not, for this reason, relied on by the courts below. Its basic inapplicability is amply shown when the section from which the asserted phrase was taken is read in its entirety:

> In any criminal prosecution brought by the United States or by the District of Columbia, a confession, as



> defined in subsection (c) hereof, shall be admissible in evidence if it is voluntarily given. Before such confession is received in evidence, the trial judge shall, out of the presence of the jury, determine any issue as to voluntariness. If the trial judge determines that the confession was voluntarily made it shall be admitted in evidence and the trial judge shall permit the jury to hear relevant evidence on the issue of voluntariness and shall instruct the jury to give such weight to the confession as the jury feels it deserves under all the circumstances. 18 U.S.C. §3501(a) (emphasis added).

In fact, this statute was not intended to apply to situations such as is involved here. Subsection (c) of §3501 forms the operational core of the statute. It provides, in pertinent part:

> In any criminal prosecution by the United States or by the District of Columbia, a confession made or given by a person who is a defendant therein, while such person was under arrest or other detention in the custody of any law-enforcement officer or law-enforcement agency, shall not be inadmissible solely because of delay in bringing such person before a magis-

trate .... 18 U.S.C. §3501(c).

The legislative history of this particular statute was carefully examined in United States v. Halbert, 436 F.2d 1226 (9th Cir. 1970), where it was concluded:

> [I]t is obvious that the prime purpose of Congress in the enactment of §3501 was to ameliorate the effect of the decision in Mallory v. United States (1957), 354 U.S. 449, 77 S.Ct. 1356, 1 L.Ed. 2d 1479, to remove delay alone as a cause for rejecting admission into evidence of a confession and to make the voluntary character of the confession, the real test of its admissiblity. 436 F.2d at 1231.

In fact, resort to the legislative history of this provision clearly reveals that Congress did not intend the section to operate to prevent a court from exercising its supervisory power to secure the enforcement of criminal law by methods which fall within the penumbra of fair play. As is stated in Senate Report No. 1097, 90th Cong. 2d Sess. 1968:



> This title would restore the test for the admissiblity of confessions in criminal cases to that time-tested and well-founded standard of voluntariness. It would avoid the inflexible rule of excluding such statements solely on technical grounds such as delay or failure to warn the accused as to his rights to silence or to counsel. We have not nullified, however, the rights of defendants to the safeguards of federal law or the Constitution. On the contrary, we have provided a more reasonable rule in that the judge shall consider all the defendant's rights (speedy arraignment, silence, counsel, knowledge of offense charged) and their possible violation in deciding as to the voluntariness of the confession and thus its admissibility. U.S. Code Cong. & Admin. News 90th Cong., 2d Sess. and 2282 (1968) (emphasis added).

The disclaimer contained in subsection (d) of Section 3501 of the statute cannot, of course, be construed as a requirement that any "confession" must be admitted under all circumstances, as that subsection merely states that:

> Nothing contained in this section shall bar the admission in evidence of any confession made or given voluntarily by any person to any other person without interrogation by anyone, or at any time at which the person who made or gave such confession was not under arrest or other detention. 18 U.S.C. §3501(d).

The thrust of Petitioner's argument, therefore, is based on the citation of this non-applicable statutory enactment, and the even more general language of Rule 402 of the Federal Rules of Evidence. Petitioner asserts that, once Congress has used the phrase "admissible", the federal courts have lost the power to suppress evidence. That notion is, of course, not supported by analysis. The statutes cited do not mandate the admission of evidence in any and all circumstances. This fact is shown by the context of 18 U.S.C. §3501 in its entirety and is even more cogently illustrated by the fact that, while Rule 402



broadly proposes that "All relevant evidence is admissible ....," Rule 403 of the same Federal Rules of Evidence sets out a wide variety of factors which would call for the exclusion of such "admissible" evidence.

The Second Circuit stated that its decision was not grounded in derogation of Section 3501(a) or Rule 402, but rather for the limited purpose of preventing chaos in criminal law administration through the presence in the same district of two sets of procedure before the grand juries. United States v. Jacobs, 547 F.2d at 777 (2d Cir. 1977).

A good example of the accommodation of the supervisory power of the federal courts in matters of criminal justice -- particularly in respect to grand jury proceedings -- with specific enactments of Congress is provided in In re Grand Jury Proceedings, 486 F.2d 85

(3d Cir. 1973). There, the Third Circuit found that particular provisions of the Crime Control Act of 1970 did not tie the hands of the court with respect to procedures not covered by the particular statute. The court was free to use its inherent supervisory powers to secure grand jury procedures which would be consonent with considerations of fair play, not limited to the bare requirements of the Constitution. See also In re Grand Jury Proceedings, 507 F. 2d 963 (3d Cir. 1975), cert. denied, 421 U.S. 1015 (1975).

2. Petitioner asserts that a conflict exists between the decision in this case and that of the Third Circuit in United States v. Crook, 502 F. 2d 1378 (3d Cir. 1974), cert. denied, 419 U.S. 1123 (1975). No such conflict exists, as the only similarity between the cases is that each involves the issue of



the proper use of the court's supervisory power to suppress testimony. In United States v. Crook, the court found that a criminal defendant in custody had been given warnings in full compliance with the requirements of the Miranda decision and, hence, the fifth and sixth amendments. Section 3501(a) applied to control the question of the admissibility of a confession. That is not the situation presented here. The holding of the Third Circuit that a court cannot exercise supervisory power to suppress testimony in a case which falls squarely within the scope of a Congressional enactment presents no conflict with the decision of the Second Circuit to utilize supervisory powers in a situation to which no statute directly applies.

The powers of a federal court to supervise the administration of criminal

justice are not limited to enforcement of minimal constitutional rights. As was cogently stated in McNabb, supra, a federal court may develop standards of criminal procedure which more adequately guarantee fairness and justice than is secured by adherence to only the bare bones of constitutional protections. The courts of appeals have consistently acted in conformity with this power, as is illustrated by the decision in United States v. Cheramie, 520 F. 2d 325 (5th Cir. 1975). There, the court of appeals used its supervisory powers to require that the district courts limit their use of supplementary jury instructions in a manner more restrictive than would otherwise be required by the Constitution itself.

This principle has also been noted in support of the exercise of supervisory power



to require uniform conduct by the government in enforcing criminal sanctions. United States v. Leahey, 434 F. 2d 7 (1st Cir. 1970). That court correctly perceived that a federal court's supervisory power permits it to go beyond minimal constitutional requirements if that is necessary to assure "citizens' faith in the even-handed administration of laws ..." 434 F. 2d at 10.

The propriety of the decision of the court of appeals in this case is further illustrated by the fact that the governmental prosecuting agencies in the circuit have themselves established a uniform policy of informing grand jury witnesses that they are putative defendants. (Pet. App. 21A) The decision in this case served to protect this particular defendant from the consequences of a deviation from this uniform practice, which the court found to be outside

the penumbra of fair play.

Of course, the Second Circuit's decision here does not conflict with the decision of this Court in United States v. Mandujano, 425 U.S. 564, 96 S.Ct. 1768, 48 L.Ed. 2d 212 (1976). There, it was held that the fifth amendment privilege against self-incrimination did not require the suppression, in a prosecution for perjury, of false statements made to a grand jury, even though the defendant had not been given Miranda warnings when called before the grand jury as a putative defendant. The decision here is explicitly not based on the constitutional grounds which were rejected in Mandujano. The sole basis of the decision here was the court's perception that an unfair prosecutional tactic should be eliminated from the administration of criminal justice in the circuit by the exercise of supervisory powers. Ristiano v. Ross, 424 U.S. 589, 597 n.9 (1976).



The Mandujano case cannot be read as espousing a policy which would give support to a prosecutorial practice uniformly rejected by prosecuting attorneys in the circuit. See also United States v. Doss, 545 F.2d 548 (6th Cir. 1976).

## THE SANCTION OF SUPPRESSION AND RESULTANT DISMISSAL OF PERJURY COUNT WAS PROPER EXERCISE OF COURT'S SUPERVISORY POWER

The Second Circuit's sanction of suppression was a proper exercise of supervision as a one-time sanction to encourage uniformity of practice between the Strike Force and the United States Attorney for the same district.

The Second Circuit stated that it was not assuming that an error of the prosecutor

in failing to give warnings in the grand jury would lead inexorably to the conclusion that the witness could not be prosecuted for perjury.

The Second Circuit in In Re Subpoena of Persico, 522 F. 2d 41 (2d Cir. 1975), had placed the Strike Force on notice of the requirement that it follow Second Circuit prosecutorial guidelines and practice.

The sanction is best explained in United States v. Estepa, 471 F. 2d at 1137 (2d Cir. 1972), when Judge Friendly said:

> ... a reversal with instructions to dismiss the indictment may help translate the assurances of the United States Attorneys into consistent performance by their assistants.

The court clearly stated that this was an ad hoc sanction properly within the parameters of the supervisory power of the Court.



## CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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